Can We Secure Consistency Between Rules of Origin and Measures to Prevent Circumvention of Anti-Dumping Measures Under the WTO Framework? —With Special Focus on the Recent Administrative and Judicial Trends in the U.S.— *

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Abstract

Under the World Trade Organization (WTO) framework, international rules on anti-dumping (AD) measures, on the one hand, and those on rules of origin (ROO) - including the provisions aiming at developing a harmonized rule of origin (HRO) - on the other, have been considered as related but distinct areas. Sensitive issues such as how to set and apply ROOs in the course of the AD investigations, and whether or not to apply the HRO to the AD measures, have also been addressed individually within each field, respectively.

However, in everyday trade administration practices, the two sets of rules, i.e., AD and ROO, are becoming increasingly cross-cutting and interdependent of each other, especially when discussing the legitimacy of "anti-circumvention" measures which counteract "circumvention" of the AD measures. Failing to address the issue of interrelationship between the two sets of rules may hinder effectiveness of international disciplines in both AD and ROO.

Until now, however, little inclusive and extensive research examining this issue has been conducted. Thus, this paper clarifies the major causes of the problem, with special focus on regulatory and judicial trends in the US. It illustrates the US approach of using ROOs more aggressively and in an extended manner, to secure effectiveness of the AD measures. As a reflection, this paper sheds light on systemic problems that this US practice creates in contrast to the longstanding pursuit of international regulation of AD measures, and the importance of multifaceted and coordinated regulatory design across both fields of AD and ROO.

Keywords: anti-dumping (AD) measures, rules of origin (ROO), anti-circumvention, World Trade Organization (WTO), regional trade agreements (RTAs: including free trade agreements (FTAs) and economic partnership agreements (EPAs))

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I. Introduction

This paper highlights the theoretical challenges arising from the conflicting policy values between the harmonization of rules of origin (ROO) and the prevention of abusive use of anti-dumping (AD) measures.

AD measures are trade restrictive measures adopted by importing countries to counter unfair trade, which may hinder world trade if they are used for protectionist purposes. At present, most large trading powers frequently use AD measures, although there are robust theoretical criticisms against the role of AD measures in supporting domestic industries in the first place. Under the World Trade Organization (WTO), the use of AD measures is justified as a tool for trade remedy to the extent that they follow specific substantive and procedural conditions set in the WTO AD Agreement (see Section II-2 for details).

In the last three decades, the risk of "circumvention" of the AD measures has become an increasingly important political agenda. Here, "circumvention" is defined as an act of evasion, or performance of an artificial operation in order to avoid application of a rule, and thus damage the essential purpose of the said rule.[1] The circumvention of AD measures includes the act of avoiding the application of AD measures, either by artificially changing the "country of origin" of the products in question, or changing the name/nature/category thereof by minor alteration.

In this paper, the author addresses the circumvention practice that (i) manipulates the country of origin so as not to be subject to prospective AD measures in the first place, and (ii) manipulates the country of origin of the products subject to the existing AD measures to avoid its application by looking into both AD and ROO. First, proponents of "anti-circumvention" measures contend that, irrespective of the extent of AD measure imposition, the effectiveness of legitimate AD measures will be greatly impaired if the application can be easily circumvented by a minor operation such as changing the production line or transporting parts from one country to another (Yu 2008).

The anti-circumvention measures taken by AD-imposing countries tend to expand the scope of existing AD measures without new investigation. This raises concerns because the WTO AD Agreement, in principle, requires WTO member states to conduct a new investigation when they want to impose AD measures. Thus, if the anti-circumvention scheme is abused, it may hinder the WTO rules on AD measures that restrict member states' policy space to impose AD measures. In this context, it is desirable to use international rules, to regulate which kind of anti-circumvention measures are allowed. However, although the WTO negotiations started in 2001 to clarify rules on the AD measures as part of the so-called Doha Round negotiations, they have stagnated without success, and regulations continue to vary from country to country.

Second, ROO is a set of rules that determine the origin of a product, unless it is solely

[1] Examining similarities between the concepts of "circumvention" and "tax avoidance" (or tax evasion / tax avoision) will be addressed in a separate article.

created in one country. Each country has its own set of ROOs for regulatory purposes, such as trade statistics and preferential treatments. Since the 1980s, the adoption of different ROOs for each country has been recognized as a problem in this field. It hinders world trade as a whole, because it increases private parties' compliance costs with regard to different rules depending on the destination. Thus, at least in theory, there is a common understanding that promoting harmonization of non-preferential ROOs will reduce the burden on traders, increase predictability, and facilitate flexible recombination of value chains around the world. To this end, in cooperation with the World Customs Organization (WCO) and the WTO, a program to formulate a non-preferential harmonized rule of origin (HRO) was launched under the Agreement on the Rules of Origin (ARO) in 1995. However, this negotiation has also been stagnant for more than a decade, and regulations differ for each country. One of the main reasons for the stagnation was that no agreement was reached regarding whether or not the HRO would apply to the AD anti-circumvention investigations and measures (see Section IV below).

In this way, in each field of AD and ROO, the relationship between the two sets of rules has been recognized as a systemic concern. Furthermore, recent trends in the AD field, particularly in the US and several other trading powers, lean toward the creation and use of special ROOs for the purpose of combating circumvention of AD measures. This has raised concerns. Setting aside its consistency with relevant domestic laws, unsubstantiated use of anti-circumvention inquiries may have an adverse impact on the WTO rules to regulate AD measures. In this respect, regulating the use of ROOs is an emerging problem in the AD field.

What is needed now is to ensure consistency in the two areas of law, that is, AD and ROO. The possibility of developing inter-sectoral coordination by addressing these common concerns within each field of law, namely, (a) the use of special ROOs to ensure the effectiveness of AD measures in the AD field; and conversely, (b) applicability of the HRO to AD anti-circumvention measures in the ROO field. However, as existing stalemates in both areas indicate, this may not be likely. Against this background, the primary objective of this paper is to identify the kind of legal tensions that occur in the first place. We then examine recent US practices to evaluate the possibilities of transparent, predictable, and coherent institutional designs to establish a coordinated set of rules across the fields of AD and ROO, at least in US law.

II. Impact of AD anti-circumvention measures on harmonization of the ROOs

II-1. Common issues relating to the inter-system adjustment

International trade law is a complex legal structure that consists of diverse areas of rules under WTO Agreements and other regional and plurilateral trade agreements, and corresponding domestic laws. Interdimensional conflict resolution among different areas of trade law is required to secure their effectiveness. Needless to say, coordination among multiple

systems is necessary under any legal system, and it is administered based on a generalized ranking of rules. Overall balancing and individual adjustments are necessary. Moreover, even if such balancing and adjustment could be accomplished within one country, it could impair the rights and interests of another country. In such cases, it is necessary to balance and adjust conflicting national interests based on international rules.

Further complicating the situation, international trade law is multi-layered, including the WTO and regional trade agreements (RTAs), and multiple international legal rules across multiple sub-areas of trade law may conflict with each other. The problem of coordinating and designing cross-sectoral coordination among multidimensional and multilevel legal systems is now emerging in various aspects of international law, especially in the field of trade law. Nevertheless, available research is insufficient to develop an inclusive and holistic approach to address these issues (Rooke 2011).

In the area of trade law, if institutional coordination within the WTO is not possible or practicable, exploring RTA disciplines may be the next best option. For example, the 2018 US-Mexico-Canada Agreement (USMCA), which is a revised version of the North American Free Trade Agreement (NAFTA), includes provisions for trilateral cooperation to prevent circumvention of AD measures (Section C, Chapter 10 of the USMCA, titled “Cooperation on Preventing Duty Evasion of Trade Remedy Laws”). The same issue has been raised in the US-Japan trade negotiations (USTR 2018:12). Although mutual approval of ROOs between RTAs can resolve the issue to some extent if different international rules are set for each RTA, the complexity of the system will remain considerable (Mavroidis & Vermulst 2018).

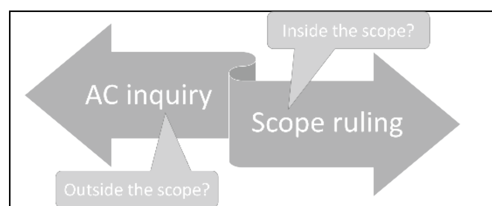
II-2. Special features of inter-sectoral tensions between AD and ROO

This paper first clarifies the characteristics of the issues that arise from the intersection of the AD and ROO fields within the framework of the WTO Agreement. First, international rules such as the WTO Agreement impose international discipline on the sovereign regulatory powers of member countries regarding trade. On the other hand, each country can impose trade restrictions under the conditions stipulated by the WTO Agreement if justifiable policy reasons exist. For example, to counteract dumping practices that damage domestic industries in importing countries, AD measures that impose surcharges on specific exporters are allowed. Second, to adequately determine the origin country of goods produced through multiple countries so as to prevent improper labeling or tariff evasion, each importing country can determine the requirements for the last “substantial transformation”’ on their own. In this sense, the AD and ROO systems are individually established and administered by each country.

Thus far, the question has been how and to what extent international discipline can be imposed on such domestic systems. However, the contemporary problem is how to deal with the situation in which serious discrepancies emerge between AD and ROO in both the domestic and international legal planes.

AD measures are based on individuality as a special tariff against unfair trade. ROO, on the other hand, is general in nature as a predictable rule that is routinely applied in customs duties. Nevertheless, in recent years, the tension between AD and ROO has become apparent in the handling of AD anti-circumvention measures (Figure 1). Specifically, the issue concerns whether it is permissible to control circumstances that attempt to evade the application of AD measures by artificially controlling the country of origin of the product.

Figure 1. Relationship between rules of origin and anti-circumvention



In general, the more intensified and detailed a legal discipline, the greater the incentive for evasion to try to bypass it rather than violate it. Even if the AD measure is imposed, if the application can be easily avoided by a minor operation, such as changing the production line or parts, the effect will be greatly impaired (Kahn & Richard 2014).

More specifically, circumvention activities are categorized into four types: (i) those that manufacture and export the target products in a third country outside the target range (so-called third country circumvention); (ii) those that make minor changes so that they are outside the range of the target products specified by the existing AD measures (so-called minor alterations); (iii) those that export generic, later-generation products that did not exist at the time of imposition of the original measures (so-called later developed products); and (iv) those that export parts of the target products and assemble them into finished products in the importing country (so-called import country circumvention). It should be noted that false statements of the country of origin and fraudulent labeling should be treated separately as a violation of customs law,[2] outside of the scope of the concept of circumvention described in this paper. In addition, changing the exporting country by transshipment in a transit country does not automatically change the country of origin- it does not qualify as a circumvention.

In response to such acts, Japan and other WTO member states have traditionally argued that new investigations are always necessary to impose AD measures, including the cases where investigating authorities expand the scope of existing measures. The AD Agreement sets forth specific conditions under which AD measures can be justified. All other measures not specified in the AD Agreement are unjustifiable.

In contrast, proponents of anti-circumvention measures argue that a new investigation is time-consuming and labor-intensive, and its effect on punishing circumvention is almost al-

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[2] For example, see *Pharm-Rx Chemical Corp., v. BMP, Bulk Medicines and Pharmaceuticals Production GMBH*, 2019 WL 1434721 (US District Court, D. New Jersey, 31 March 2019).

ways limited because of time lags between initiation and the final findings, unless the AD measures are applied retrospectively. In this regard, the US and the European Union (EU) can take anti-circumvention measures to extend the existing AD measures to products outside the originally set range in order to deter circumvention. More recently, the US has begun to apply special ROOs that are applicable only to individual AD investigations for the purpose of anti-circumvention exercises. This is because the use of a general ROO may lead to changes in production lines and trade routes that circumvent existing anti-circumvention measures. Recently, there have been a considerable number of WTO member countries that allow “anti-circumvention” measures, and the number is increasing (Kobayashi 2009:215).

The adoption of such an operation depends on the institutional design of the AD and ROO in each country. However, even if fine adjustments are made under the national law of each country, this is not the end of the story. Differences between countries may hinder smooth international trade. In addition, if each country is permitted to operate ROOs that are specifically made for the purpose of AD investigations including anti-circumvention inquiries, there is a risk that AD measures can be abused by manipulating these ROOs, creating an additional burden on private traders who have to deal with different ROOs. There is also a risk of impairing the effectiveness of international rules in both areas.

The core questions regarding this issue are summarized below. On the one hand, how effective should AD measures be? In this context, let us reiterate that the AD measure, which is a trade restrictive measure taken by importing countries to counter unfair trade practices, is an exception to the WTO principles of non-discrimination and liberalization, and is permitted only to the extent allowed by the AD Agreement. In this regard, if anti-circumvention measures are abused by WTO member states by extending AD measures without original investigations, it is tantamount to WTO member states “circumventing” obligations under the AD Agreement under the name of “anti-circumvention” measures, which impair the effectiveness of the WTO rules as a whole. Therefore, it is desirable to crystalize, by international rules, what kind of anti-circumvention measures are allowed.

However, the Doha Round negotiations have been suspended for more than 10 years. Willing countries have continued to develop their own systems for anti-circumvention. Thus, establishing common disciplines through regional trade agreements (RTAs) among the respective partners may be the second-best option. However, the application of AD measures differs depending on the countries involved. There are various issues regarding feasibility, even if it is technically allowed, and no progress has been made in practice until now. In the field of AD, we need to consider whether and to what extent a country is allowed to prevent circumventions under international rules such as the WTO and RTAs.

On the other hand, how uniform should ROO be? The process of formulating a non-preferential HRO so that country-specific ROOs would not hinder trade itself, began in 1995 with the cooperation of the WTO and the World Customs Organization (WCO). However, this is in a stalemate exactly due to the disagreement among the participating nations regarding the treatment of AD anti-circumvention measures (so-called “implications issue”). Moreover, in recent years, many RTAs have come to coexist. It has been indicated that the

coexistence of different preferential ROOs may hinder trade, and that coordination between preferential ROOs is an issue (van de Heetkamp & Tusveld 2011). Although some RTAs promote harmonization and mutual recognition of different preferential ROOs, these harmonized rules can be applied only to individual RTAs. Some countries would still be reluctant to apply these harmonized ROOs to AD investigations from the perspective of anti-circumvention, since it may again induce circumvention of existing AD measures. Therefore, the issue of positioning AD anti-circumvention measures when harmonizing ROO in the WTO and WCO becomes an issue.

II-3. Need for cross-sectoral analysis and organization

What kind of integrated analytical framework can be presented for the rule of law in the above two fields? In light of the above two analyses, an examination of the international systems at which the coordination between the above two systems can be conducted is required. What kind of legal response can be made to address the problem where the AD and ROO systems are linked and disaccord in both international and domestic planes? Certainly, at this point, no consensus has been reached on any of the issues in global forums such as the WTO, WCO, and OECD. Is it possible to deal with these issues by RTAs, or is it necessary to carry out an integrated restructuring in the WTO and other organizations? Is the alternative to leave this issue to the domestic legislation of each country? To answer these questions, we must consider whether (i) the WTO and other global rules are optimal, (ii) the adjustment is required at the level of regional/sectoral rules such as RTAs, or (iii) harmonization of national laws of each country is also optimal.

Since international regulation of the AD and the ROOs have long been controversial in multilateral negotiations under the WTO, as well as its predecessor, the General Agreement on Tariffs and Trade (GATT) 1947, many studies have been conducted on their functions and discipline. Researchers and practitioners have often analyzed the interpretation of the ARO on the harmonization of non-preferential ROOs in relation to the AD rule negotiations (JASTPRO 2016). Comparative analysis between preferential ROOs in the RTA has also been actively conducted. Concerning the current status of operation at individual RTAs, the contributions of experienced government officials and lawyers are significant (White & Case 2016).

On the other hand, AD and ROO are traditionally developed as different fields of international trade law. In many countries, these two fields are divided into the jurisdiction of different ministries, which prevents the government from elaborating integrated schemes across both fields. Empirical and theoretical analyses from an integrated perspective are scarce. In the field of AD, when discussing the nature/mode/procedure of the anti-circumvention measures, little attention has been paid to the design of ROOs, and even less attention to the fate of the HRO project. Similarly, in non-preferential HRO projects, little attention has been paid to the sensitivity of anti-circumvention measures in the field of AD, and to the possibilities of developing inclusive discussions together with the Doha Round nego-

tiations or other fora, except for some negotiators' proposals.

Therefore, it is necessary to develop concrete and feasible options for multilateral institutional coordination. Certainly, such work requires cross-sectoral research that also bridges practice and academia. This study focuses on highlighting the characteristics of contemporary problems.

III. Recent US operations related to the relationship between AD anti-circumvention and ROO

III-1. Overview of issues relating to AD anti-circumvention

III-1-1. Positioning of anti-circumvention measures in the AD Agreement

GATT, incorporated as part of the WTO Agreement, prohibits the imposition of tariffs above the levels listed in the Schedule of Concessions in terms of trade in goods (GATT Article II, Paragraph 1). However, imposing an AD tax or countervailing duty consistent with Article VI is permitted as a legitimate exception (Article II, paragraph 2). More specifically, dumping is to be "condemned" if it causes or threatens to cause material injury to domestic industries of the importing contracting party (Article VI, Paragraph 1). It then stipulates that a contracting party may impose special duties that do not exceed the margin of dumping in order to offset or prevent dumping (Article VI, paragraph 2). However, this does not mean that contracting parties have an inherent right to impose AD measures. Rather, it is regarded as an exception in that AD measures can be imposed only when the stipulated conditions under the GATT are satisfied.

The AD Agreement adopted in 1994, as part of the WTO Agreement, detailed the substantive and procedural requirements for determining dumping, injury, and causation. The AD measure is still exceptional because it stipulates that AD measures can be taken "only under the circumstances" provided for in Article VI of GATT and "pursuant to investigations initiated and conducted in accordance with the provisions" of the AD Agreement measure (AD Agreement Article 1). It is apparent that taking an AD measure is legitimate but exceptional. It is reiterated in Article 18.1, which states that "[n]o specific action against dumping of exports" from another member states "can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

In this context, neither the GATT nor the AD Agreement stipulates what kind of measures can be taken in the case of "circumvention" of existing AD measures (Stewart 1994:1616ff). Is it justified to take "anti-circumvention" measures to ensure the effectiveness of AD measures? The views of WTO members are divided even on this core question. Japan and other countries contend that the use of AD measures should be restrained, in view of the above-mentioned exceptional nature of AD measures. From this perspective, anti-circumvention measures that expand the scope of existing AD measures without a new survey must be strictly restricted. On the other hand, the US, EU, and several other countries contend that it would be meaningless to conduct a new investigation for each individual circum-

vention practice because it would effectively result in a cat-and-mouse game. They also argue that allowing circumvention seriously impairs the effectiveness of the AD measures that are legitimately taken in accordance with the GATT and the AD Agreement. In any case, several WTO member states developed a domestic legal system to counteract circumvention, based on their interpretation of the WTO rules.

It is true that "anti-absorption" measures, which increase duty rates on subject merchandise in cases where their export prices did not increase in coordination with the existing AD duties, are widely recognized as legitimate tool to address absorption, even if the AD Agreement does not explicitly endorse to do so. Therefore, proponents of anti-circumvention measures argue that it is not an essential condition for the AD Agreement to have explicit permissive provisions. Still, serious systemic concern remains about the risk that the WTO AD disciplines as a whole can be "circumvented" to the detriment of global trade, if the anti-circumvention measures are abused by its member states.[3]

The disagreement on the legitimacy of anti-circumvention was also sharpened in the AD Rules negotiations as part of the Doha Round negotiations that started in 2001 to improve and clarify the disciplines under the AD Agreement. In 2007, the Chair of the negotiating group issued a textual proposal that a new provision should be inserted to clarify the legal basis of "anti-circumvention" measures under the AD Agreement.[4] However, the Chair's text issued in 2008 deleted those mentions based on Chair's understanding that there was a lack of agreement between member states.[5] Since then, there have been no developments in the legitimacy/availability of anti-circumvention measures until now. However, there have been sporadic exchanges of opinions regarding the content and transparency of individual anti-circumvention measures in the discussions of the AD Committee.[6]

III-1-2. Outline of the AD anti-circumvention inquiry system in the US

Under US law, investigating authorities for AD measures conduct an anti-circumvention inquiry against (a) importing-country circumventions, (b) third-country circumventions, (c) minor alterations, and (d) later developed products (19 U.S.C.A. § 1677j). If the examination revealed circumvention practices out of the inquiries, the scope of existing AD measures could be expanded without conducting new investigations. Among them, the third-county circumvention involves the application of ROOs more frequently than not. Namely, investigating authorities find third-country circumvention if a product of the subject companies (or their affiliates) is in the "same class or kind" of product as the products

[3] The government of Japan published its opinion on this issue as a public comment for an AD investigation on Titanium Sponge. https://www.regulations.gov/docket?D=BIS-2018-0027. See also Brett Fortnam, "Japan and its Titanium Sponge Industry Rebut Claims Behind 232 Probe," *Inside US Trade*, 3 May 2019, 2019 WLNR 13777487, p. 18.

[4] "The authorities may extend the scope of application of an existing definitive anti-dumping duty to imports of a product that is not within the product under consideration from the country subject to that duty if the authorities determine that such imports take place in circumstances that constitute circumvention of the existing anti-dumping duty." *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213, 30 November 2007, pp. 22-24.

[5] *Consolidated Chair Texts*, TN/RL/W/236, 19 December 2008, p. 21.

[6] *Minutes of the AD Committee*, G/ADP/M/40/Rev.1, 7 July 2011, para. 49.

subject to the existing AD measures which are imported from third countries (19 U.S.C.A. § 1677j(b)). More specifically, when "minor or insignificant" parts of the subject merchandise are imported from countries subject to AD measures, investigating authorities may view it as a case of importing-country circumvention that intends to evade existing AD measures. In this case, these parts and components can be added within the scope of existing AD measures (19 U.S.C.A. § 1677j(b)(1)).

In doing so, consideration should be given to (i) the pattern of trade (including sourcing patterns of the said parts and components), (ii) whether manufacturers of those products are affiliated with companies subject to the existing AD measures, and (iii) whether the imports of the said parts increased to the third country after the initiation of the investigation that led to the existing AD measures (19 U.S.C.A. § 1677j(b)(3)). In addition, in determining whether it is "minor or insignificant," the following must be considered: (1) the level of investment in the third country, (2) the level of research and development in the third country, (3) the nature of production in the third country, (4) the degree of production equipment in the third country, and (5) whether or not the value added in the third country is a small percentage of the finished products imported into the U S (19 U.S.C.A. § 1677j(b)(2)).

III-1-3. Development of multiple tools for anti-circumvention

The focus of this paper is not to identify the pros and cons of anti-circumvention measures in the US by and of itself. More importantly, there are various ways to deal with circumvention other than anti-circumvention inquiries, which highlight how the ROO design plays an important role. Without due regard to such various forms of addressing the risks of circumvention, the risk of diminishing the effectiveness of WTO rules remains, irrespective of detailed international discipline for the anti-circumvention measures alone.

Traditionally, the following measures were available to the investigating authorities (Figure 2). First, it is possible to set a broader scope of the original AD measures to prevent circumvention in the first place, and to adjust ROOs to identify the subject merchandise so that investigating authorities can track potential countries where dumping is more likely to occur (see *Canadian Solar* case mentioned in Section III-3-1). Second, if there is room for interpretation of the scope of original AD measures and ROOs, the "scope rulings" (19 C.F.R. § 351.225(a)) is another tool to address artificial trade manipulations that intend to escape the application of existing AD measures by adding non-substantive operations. Note that this option is available if it is included in the target of the existing AD measures (see *Bell Supply* case mentioned in III-2-1 below). Third, the patterns of trade that cannot be captured by scope rulings may still be subject to new investigations, as the last resort. There is no objection, including from Japan, regarding the availability of the three methods described above. In addition to these three tools, the fourth option that has been contentious among WTO member states is the anti-circumvention inquiries, which expand the original scope of the existing measures to address specific unfair trade practices without conducting new investigations. As mentioned above (II-2), the US is not the only WTO member state to legalize this option.

Figure 2. Traditional options for US investigating authorities to address risks of AD circumvention

(1) Setting broader scope when defining subject merchandise (* Can create case-specific ROOs for the subject merchandise in individual measures) (2) Conducting "scope rulings" to clarify the range of the original measures (3) Conducting new investigations (* Option (1) above is also available in this context) (4) Conducting anti-circumvention inquiries

Until recently, anti-circumvention inquiries have been considered the only option to deal with the problem of circumvention, subject to contention for three decades. In this sense, adjusting ROOs and conducting anti-circumvention inquiries have traditionally been seen as separate issues of law. However, as will be shown in the next section, the recent US operation has linked the two fields more closely. Notably, the investigating authorities have broader options for anti-circumvention. Therefore, it is necessary to investigate the overall picture of anti-circumvention and analyze how these options are organized in the domestic laws of each WTO member state, and how such domestic laws affect WTO discipline. In the following, the *Bell Supply* case (III-2-1), *Canadian Solar* case (III-3-1), and *Kyocera Solar* case (III-3-2 (2)) will be taken up as recent leading cases.

III-2. Availability of procedure to determine coverage prior to anti-circumvention investigation

III-2-1. Bell Supply Case

In recent years, the relationship between AD anti-circumvention and ROOs has become more complicated in the operation of the AD system in the US, which is dealt with by the US investigating authorities, namely the Department of Commerce and International Trade Commission. First, a judgment of the US Court of Appeals for the Federal Circuit (hereinafter referred to as the CAFC) in *Bell Supply v. US* (hereinafter *Bell Supply* case) in April 2018 is a landmark case law that decoupled AD anti-circumvention and the determination of ROOs (*Bell Supply Company, LLC v. United States*, 888 F.3d 1222 (CAFC 2018)). It opened the door for the investigating authorities to use administrative procedures other than scope rulings and anti-circumvention inquiries to combat circumvention of the AD measures, including the examination whether the "substantial transformation" has been carried out.

Originally, there is no dispute that the Department of Commerce has the discretion to detect circumvention in the scope rulings for existing AD measures. However, there is a limit to its discretion, in the sense that expanding the scope of existing measures for anti-circumvention is prohibited (*Appleton Papers Inc. v. United States*, 929 F.Supp.2d 1329, at 1337 (CIT 2013)). In *Bell Supply* judgment, so-called "green tubes," which are products before heat treatment, were diverted to a third country after AD measures were imposed on

"finished or unfinished" oil country tubular goods (OCTG) made in China. The volume of green tubes exported to third countries increased, and the volume of OCTG exports to the US increased in these countries. According to the ordinary ROOs used by US customs authority, the country that processed OCTG by heat treatment from green tubes is recognized as the "country of origin." Thus, the products finished in the third countries are technically outside of the existing AD measures.

However, investigating authorities declared that AD investigating authorities are not bound by the ROOs applied by the customs authority: they can employ their own ROOs instead. In this case, the investigating authorities applied their own ROOs in the scope ruling by determining that, considering all the circumstances of the case, the processing from green tubes to OCTG falls short of substantial transformation.[7] Therefore, it was initially determined that the products exported from the above-mentioned third countries were subsequently determined as unfinished OCTG exported from China and included in the scope of the existing AD measures.

Unsatisfied with this administrative determination, consumers of OCTG in the US filed a case against the Department of Commerce, claiming that they should not be able to include green tubes in AD products because these products are outside of the scope of the AD measures. The International Trade Court (CIT) ruled against the Department of Commerce, finding that only an anti-circumvention inquiry is available to address the risk of circumvention in this context, and it is illegal to use the scope ruling instead. However, the CAFC found that the determination of the existence of substantial transformation is a separate and prerequisite factor for the determination of circumvention that is to be conducted by subsequent anti-circumvention inquiries. Thus, vacating the CIT judgment, CAFC found that applying ROOs in scope rulings is legal under US law.

The structure of the CAFC findings is as follows: First, the process of certifying the country of origin by applying ROO for a certain product is necessary to determine whether the product in question is originally subject to existing AD measures. At this stage, if it is found to be within the scope of existing AD measures, it is not necessary to initiate a separate anti-circumvention inquiry. On the contrary, if it is determined that the product in question is not covered by existing AD measures, then it is necessary for investigating authorities to determine whether to conduct an anti-circumvention inquiry or a new investigation on the product in question. In this way, CAFC accepted the plaintiff's allegation that it is unreasonable to conduct anti-circumvention inquiries first, because the scope ruling procedure and anti-circumvention inquiries are at different stages. Therefore, the CIT judgment was vacated and remanded to the CIT.

III-2-2. Implications

It is surprising that the *Bell Supply* judgment shown in the previous subsection allowed,

[7] Note that the case is still pending because CIT remanded the case to the DOC due to insufficient evaluation of evidence as shown in the previous judgment in October 2018. See *Bell Supply Company, LLC v. United States, 348 F.Supp.3d 1281*, at 1289 (CIT 2018).

for the first time in the high court stage, the investigating authorities to interpret and apply ROOs in order to deal with the circumvention before commencing anti-circumvention inquiries. Certainly, it has long been acknowledged that investigating authorities can adjust the scope of existing AD measures through scope rulings; in some cases, the scope extends; in other cases, it shrinks. In addition, AD investigating authorities are not necessarily bound by ROOs used by customs authorities, because in every AD measure, the subject merchandise is defined under specific classifications, which are more often than not, different from tariff classifications used by the customs authority and the ROOs corresponding to the tariff classifications. In essence, by recognizing that circumvention can be dealt with as part of the scope rulings on existing AD measures, in the broad sense, the US investigating authorities' options for AD anti-circumvention have been expanded.

Shortly thereafter, within a month of CAFC's *Bell Supply* judgment, the investigating authorities used their new tool to address circumvention problems. In the final determination of the anti-circumvention inquiries regarding AD measures on corrosion-resistant steel products (CORE) made in China (hereinafter, Chinese CORE case), dated May 23, 2018, the investigating authorities determined the country of origin of a product at hand based on a categorical difference of anti-circumvention phase from the original scope setting phase.[8] The investigating authorities pointed out that the purpose of the analysis in anti-circumvention inquiries was different from the scope rulings. In scope rulings, the subject matter is whether or not the product in question falls within the scope of existing AD measures. In contrast, anti-circumvention inquiries assume that the product in question is technically outside the scope of the existing measures. Nevertheless, they determine whether such processing of the product in question is "minor or insignificant," and should be covered by the original measures. According to the investigating authorities, this inherent difference justifies the use of different ROOs in the two proceedings. Rather, according to the investigating authorities, it is meaningless to use the same ROO in anti-circumvention inquiries where the act of evading the ROO of the original measures is at issue.

Although the scope of the impact of the *Bell Supply* judgment decision is still unclear, it is fair to say that WTO member states should pay attention to the impact of the recent use of special ROOs during the process of discussing possible international regulations on anti-circumvention measures. Otherwise, any international rules that are limited to anti-circumvention inquiries will soon become less significant. However, the CAFC judgment in the *Bell Supply* case illustrates the possibility of using ROOs to determine whether or not there is a "substantial transformation" as a vehicle to justify broader demarcations of the scope of the existing measures, thereby decreasing predictability for private traders while increasing the risks of abuse from protectionist perspectives.

[8] *Certain Corrosion-Resistant Steel Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 83 FR 23895, 23 May 2018.

III-3. To what extent ROO can be set and changed for the purpose of AD anti-circumvention?

III-3-1. Canadian Solar Case

In the judgment in *Canadian Solar v. US* (hereinafter referred to as the *Canadian Solar* case) in March 2019, the CAFC found that the US investigating authorities may conduct a new AD investigation to establish ROO to determine the scope of the subject merchandise. If they believe it is necessary to design the scope for the purpose of preventing circumvention in advance, it is also legal to use a special ROO that does not even use the "substantial transformation" criteria, according to the CAFC (*Canadian Solar, Inc. v. United States*, 918 F.3d 909 (CAFC 2019)).

The issue in this case was a series of AD measures on solar panels, beginning with the AD measures on particular solar panels made in China. Customs' ROO, based on the "substantial transformation" standard, identified that the country of origin is the place where the cells are manufactured. The first AD measure (hereinafter, Solar I measure) on the photovoltaic panel made in China covered the finished products, major parts (cells), and those assembled into finished products in a third country using cells made in China. Cells assembled in a third country using cells from countries other than China were excluded from the scope of the measure. Panels assembled in China using cells from a third country were also excluded. Subsequently, the US domestic industries that applied for the Solar I measure claimed that the Chinese companies subject to the measures changed their trade patterns as follows: (1) through the process of manufacturing cells in a third country, panels were assembled in China and then exported to the US; and (2) cells were manufactured in Taiwan, panels were assembled the panels in a third country and then exported to the US. All were exempt from the Solar I measure because of the exclusion provisions shown above.

To deal with these products outside the Solar I measure, the investigating authorities conducted two new investigations. The result was, first, an AD measure imposed for capturing the processing in China ((1) above), and panels in China using cells, modules, or laminates made in third countries (hereinafter Solar II China measure). The country where the goods were assembled was covered with this new measure. The second measure (hereinafter Solar II Taiwan measure) aimed to capture processing in Taiwan ((2) above), which was assembly in a third country using cells manufactured in Taiwan. However, to avoid duplicate applications with the Solar II China measure, the Solar II Taiwan measure did not cover cells assembled in China using cells manufactured in Taiwan. It should be noted that the two separate investigations intended to target different products and processing patterns, and that the investigating authorities did not adopt the traditional "substantial transformation"' standard for the Solar II China measures. More specifically, the country in which the panels were assembled was identified as the country of origin. The fundamental point here is that ROOs are set and applied individually in a different manner depending on the purpose of the investigation.

In contrast, Chinese solar panel manufacturers that are subject to one or more of the three AD measures filed a case against the Department of Commerce, arguing the following: (1) setting ROOs that do not use the "substantial transformation" criteria in the Solar II China measure is an unjustifiable departure from established administrative practices that amount to arbitrary and capricious, lacking reasonable grounds and substantive evidence, and (2) applying different ROOs for substantively similar products constitute unreasonable discrimination among the equals. In the *SunPower v. US* case (hereinafter referred to as the *SunPower* case) in 2017, CIT dismissed the plaintiff's claim on the basis that the investigating authorities showed certain evidence (*SunPower Corp. v. United States*, 253 F. Supp. 3d 1275 (CIT 2017)). On appeal, renamed the *Canadian Solar* case, the CAFC upheld the CIT judgment in 2019.

The CAFC's judgment consists of the following two points: First, it is true that investigative authorities have always set ROOs based on the presence or absence of "substantial transformation" in the "type" of products, subject to AD measures. However, legally speaking, investigating authorities can exercise discretion with regard to determining the "type" of products for each AD investigation/measure. Therefore, it is possible to set it as they did in the Solar I measure, or to set different standards such as the Solar II China measure. However, this does not imply that investigating authorities can set the "types" of products in any manner. They must maintain reasonableness and consistency. To justify an ROO set differently than it has been for many years, investigating authorities must demonstrate (i) it is allowed, (ii) there are good reasons, and (iii) they are considered more suitable in the light of the case at hand.

Regarding this series of AD investigations, the dumping practice that caused damage to domestic industries was not covered by Solar I measures. There was also a suspicion of circumvention practices to the detriment of the effectiveness of the existing measures. Thus, setting different standards helps make it possible to capture them according to the investigating authorities. In addition, evidence submitted by the domestic industries included comments by the CEO of the Chinese companies subject to investigation, even before its final determination, indicating his intention to change the "type" of the products once the AD measure was imposed.[9] This comment was made publicly, whereby exports could be continued at a small additional cost by rearranging the supply chain so that it would not be covered by the AD measure. Based on this public information, domestic industries argued that companies subject to investigation are abusing the traditional "substantial transformation" criteria to escape the Solar I investigation/measure. The investigating authorities argued that they did not solely rely on the news article, nor did the companies subject to investigation deny the fact that such a production shift had actually taken place, which would have undermined the effectiveness of the Solar I measure.[10] Nonetheless, the investigating authorities

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[9] Wiley Rein LLP, *Certain Crystalline Silicon Photovoltaic Products from China and Taiwan*, Inv. Nos. 701-TA-511 and 731-TA-1246-1247 (Final) Hearing, 8 December 2014, p. 7.

[10] *Final Results of Redetermination Pursuant to Court Order: SunPower Corp. v. United States*, Consol. Court No. 15-00067, Slip Op. 16-56 (June 8, 2016), 5 October 2016, p. 20.

concluded that the evidence was genuine. Although the plaintiffs argued that it is unreasonable to base the fear of circumvention in setting the ROO because such fear is unrelated to the design of ROOs, CAFC found that it was not unreasonable for investigating authorities to consider this fear as a reason, and confirmed that the explanation by the investigating authorities was supported by evidence and thus valid.

Second, the plaintiffs argued that investigating authorities should deal with the fear of circumvention by conducting a new investigation as they did for the Solar I measure, possibly on a wider range of products or by conducting an anti-circumvention inquiry. However, the court rejected these arguments, stating that it is unreasonable to force investigating authorities to conduct a new investigation for supply chain recombination, and the investigating authorities have no obligation to do so. Finally, as is shown in the *Bell Supply* judgment, the court reiterated that determining the scope of specific AD measures is a matter prior to the anti-circumvention inquiries, so anti-circumvention inquiries are not the only option available.

III-3-2. Implications

(1) Decoupling of the "substantial transformation" principle in AD investigations

The CAFC allowed investigating authorities to use ROOs as a tool counteracting potential circumvention, even if that would depart from the longstanding administrative tradition to use "substantial transformation" standard. Certainly, it is necessary to pinpoint the specific dumping practice that causes material injuries, because the purpose of AD measures is to counter the dumping that injures domestic industries. Therefore, setting the ROOs for each case was not a problem. In addition, in the case of the Solar II China investigation, the management of the companies under investigation admitted to attempting to escape AD measures at a small additional cost primarily to evade an incoming AD measure. Therefore, it is premature to conclude that the investigating authorities' aggressive use of ROOs to counter circumvention is justified in a different setting. In any case, although it is understandable that such a statement by the CEO was made out of concerns for investors and business partners in light of possible deterioration of business outcomes, it was not intended to be taken seriously.

What conditions would justify the response to the fear of circumvention where there is a more densely reorganized supply chain, and how will investigating authorities appropriately exercise their discretion? The extent to which such legal control should extend is unclear because the extensive use of special ROOs may diminish legitimate business expectations of traders. As early as March 2019, investigating authorities expanded the scope of existing AD measures in their final determination of an anti-circumvention inquiry, in accordance with the *Canadian Solar* judgment, even in the context irrelevant to the existence of substantial transformation.[11] Therefore, it is necessary to pay close attention to the impact of this judg-

[11] *Certain Steel Wheels from the People's Republic of China: Final Determination of Sales at Less-Than-Fair-Value*, 84 FR 11746-01, 28 March 2019.

ment.

This judgment may have a major impact on the effectiveness of international regulations of AD measures, in that the CAFC has changed the legal interpretation in a manner that further complicates the relationship between AD anti-circumvention and ROOs. First, if investigating authorities can use special ROOs completely different from those used by customs authorities solely based on the "concern" of circumvention (even though certain evidence is required), and by disregarding the elaborate analysis and determination of circumvention that is required in anti-circumvention inquiries, they will have wide discretion to expand the scope, and extend the length, of the existing AD measures. This poses a serious risk that existing WTO rules on AD measures can be watered down. In practice, it is expected that the burden on the side of private traders to respond to AD investigations and their burden of complying with AD measures will increase, especially to the detriment of the interests of small and medium-sized companies.

Applying a special ROO to broadly capture the subject merchandise in a new AD investigation would make it more difficult for investigating authorities to demonstrate injuries and causal relations, which are requirements for imposing AD measures. Therefore, artificial manipulation is difficult to achieve. However, unless there is a clear limit to administrative discretion, the risk of abuse is substantial. In addition, unlike the new investigation, the scope ruling procedure does not require individual certification of injuries caused by the products within the scope.[12] If the formulation of ROOs is used abusively, there is a risk that once the AD measure is triggered, it will continue by expanding the scope of the measure subsequently, even if the changes in the production process are made as legitimate business decisions.

Second, even if the proposed amendment to the AD Agreement is intended to provide disciplines on the anti-circumvention inquiry to prevent its abuse, it will leave loopholes, especially if other means have similar functions, such as the use of special ROOs in a separate phase. This is outside the scope of international regulations.

(2) Impact on third countries 1: Collateral damage for Japanese companies

These recent US practices have affected manufacturers in third countries. The case of *Kyocera Solar v. US* (hereinafter, *Kyocera Solar* case) discussed the application of different ROOs for virtually the same products, for the purpose of conducting an AD investigation on a certain product, on the one hand, and capturing the circumvention that occurred after that, on the other. CIT judgment in *Kyocera Solar* found it valid based on the standard of reasonableness (*Kyocera Solar, Inc. v. United States*, 253 F.Supp.3d 1294 (CIT 2017): so-called *Kyocera II* judgment).

During the scope ruling for the AD measures related to Solar II Taiwan measure (see *Canadian Solar* case shown in III-3-1), US investigating authorities examined certain solar cells made by Kyocera Solar, one of the major Japanese solar panel manufacturers, and de-

[12] *Carbon and Certain Alloy Steel Wire Rod from Mexico: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 84 FR 9089-01, 13 March 2019.

termined that solar panels made with Taiwan-made cells, assembled in Mexico, and then exported to the US should be included within the scope of the Solar II Taiwan measures. According to the investigating authorities, this is because the ROO developed for the Solar II Taiwan measure does not recognize the process of manufacturing panels from cells as "substantial transformation." To reach this conclusion, other factors such as the period when Kyocera Solar started to use Taiwan-made cells, and whether the procurement source was changed from Chinese-made cells to Taiwan-made cells after Solar I measures, were not taken into account.

From the perspective of Kyocera Solar, it was collateral damage from the above-mentioned use of a special ROO for anti-circumvention purposes (see III-3-1), regardless of the fact that Chinese companies or their subsidiaries committed the alleged circumvention practice. First, Kyocera Solar filed a complaint against the investigating authorities asking for exemption, because of the low export volume of solar panels manufactured in Mexico using Taiwanese cells, which ended unsuccessfully. Subsequently, Kyocera Solar filed a lawsuit against the investigating authorities, arguing that it was unreasonable for the investigative authorities to employ different ROOs in Solar II Taiwan and in Solar II China measures.

However, it lost the case (*Kyocera Solar, Inc. v. United States International Trade Commission*, 844 F.3d 1334 (CAFC 2016): *Kyocera I* judgment). The investigative authorities argued that it was permissible under the law to apply different ROOs because these two AD measures have different targets. Specifically, the Solar II China investigation was concerned about the alleged circumvention problem of assembly in China. Thus, the "panel assembly" process was the main criteria to identify the scope of the measure. On the other hand, Solar II Taiwan investigation focused on the use of Taiwan-made cells, so the "cell manufacturing" process was the main criteria. In addition, while the Solar II China investigation looked into domestic price trends in China, the Solar II Taiwan investigation focused more on the price trends outside Taiwan. Thus, even the investigating authorities claimed that using different evaluation methods for different types of price trends would not be a discriminatory treatment between the same or similar products.

The CIT found that the Department of Commerce provided substantial evidence on why they adopted different ROOs and different criteria for price trends during separate investigations for the same product, and found them to be valid.

(3) Impact on third countries 2: Impact on EU AD measures

Under Article 13 of the AD Regulations of 2009, the EU investigating authorities may conduct review procedures that are different from the new investigations in order to prevent circumventions, which may lead to the expansion of the scope of existing AD measures.[13] "Circumvention" is defined as a change in the trade pattern between a third country and the EU or between the subject country and the EU, which lacks justification or economic rationale other than avoiding the application of the existing AD measures. If there is evidence

[13] *Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries who are not members of the European Union (codification)*, OJ L176/21 (30 June 2016), p. 41.

that an artificial process or work is done, and that the effects of the existing measures are impaired, there is evidence of dumping in terms of the difference from the normal value initially set in the existing AD measures (Article 13.1 AD Regulations). Regarding the evaluation criteria, four types of circumvention are listed as unfair practices, namely: (i) minor alterations to the products, (ii) third-country circumvention, (iii) transshipment, and (iv) minor assembly operations in a third country or in the EU. However, it is not an exhaustive listing, and circumvention in other forms can also be captured.

Among them, when deciding an assembly operation in a third country or in the EU as circumvention, EU investigating authorities consider the following three factors of evidence (paragraph 2 of Article 13): (a) the production surge after the initiation of the original AD investigation, (b) value of the components, whether or not it was 60% or more of the finished product price, with certain exceptions; (c) the effect on the existing AD measure evaluated by (c1) the decline in price or quantity, and (c2) existence of dumping calculated by the price difference from the normal value identified during the original investigation of the existing AD measures.

With regard to solar panels made in China, the EU has also imposed AD measures against them since 2013. Based on a complaint from domestic industries in 2015 about third-country circumvention bypassing Malaysia and Taiwan, the EU investigating authorities initiated an anti-circumvention inquiry.[14] In 2016, the scope of existing AD measures was extended to Taiwan and Malaysia, based on the finding that all of the above three factors were satisfied.

Although the AD measures have been expanded, not all companies in Malaysia and Taiwan are automatically subject to the revised AD measures. If a company does not have a track record of exporting subject merchandise during the target period and wants to export the subject products to the EU, it can apply for exemption from the extended AD measures. Note that the investigating authorities consider whether the new export practice constitutes a circumvention. For example, Jinko Malaysia is a wholly owned subsidiary of Jinko Solar, a Chinese company subject to existing AD measures on the said solar panels from China. When the scope of existing AD measures was expanded in 2016 (see III-3-1 above), Jinko Malaysia was excluded because Jinko Malaysia satisfied the following elements:[15] First, products that Jinko Malaysia was trying to export to the US were not purchased from Jinko Solar. Second, Jinko Solar Holdings, which were established in the Cayman Islands as the parent company of Jinko Solar, already had manufacturing facilities in Portugal and South Africa, in addition to China and Malaysia. Since 2014, Jinko Solar Holdings had implemented a management policy to expand manufacturing in any regions where the market was

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[14] *Commission Implementing Regulation (EU) 2016/185 of 11 February 2016, extending the definitive anti-dumping duty imposed by Council Regulation (EU) No 1238/2013 on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and in Taiwan or not*, OJ L37/76.

[15] *Commission Implementing Regulation (EU) 2017/1997 of 7 November 2017, amending Implementing Regulations (EU) 2016/184 and (EU) 2016/185*, OJ L289/1, recitals (13)-(18).

expected to expand, and in the same year, it decided to construct production facilities in Malaysia. Third, Jinko Malaysia had the ability to produce the subject merchandise on its own, and has never been engaged in "circumventing" activities such as transshipment. Fourth and finally, being a wholly owned subsidiary of a company subject to AD measures is not a reason to reject the application for exemption.

In this way, the EU has also established its own anti-circumvention measures with detailed standards and procedures, while the discipline under the AD Agreement remains unclear. On a related note, the EU has traditionally used special ROOs for anti-circumvention purposes. With regard to the third element shown above, it is unclear how and to what extent the EU investigating authorities treat "evidence" of circumvention without conducting a formal anti-circumvention inquiry, or whether they consider flexible use of the ROOs to address the fear of circumvention. If the EU follows the lead of the CAFC judgment in the *Canadian Solar* case (see III-3-1 above), it may open the door for the EU investigating authorities to use litigation materials such as briefs and non-confidential records published in the US as "evidence" to determine the existence of circumvention. Anti-circumvention measures in one country may have repercussions on other countries, which will increase the number of anti-circumvention measures globally. It may also place a further burden on companies subject to AD measures.

III-3-3. Summary

From the observations in this section, the options for combating AD circumvention in the US today can be organized as shown in Figure 3.

Figure 3. Current options available to US investigating authorities for AD anti-circumvention

(1) Setting a broader scope when defining subject merchandise (* Can create case-specific ROOs for the subject merchandise in individual measures) (2) Conducting "scope rulings" to clarify the range of the original measures (*Can apply new ROOs even if the product scope is intact) (3) Conducting new investigations (*Can apply new ROOs even if the product scope is very similar to the previous ones) (4) Conducting anti-circumvention inquiries (*Option (1) above is also available in this context, using case-specific ROOs)

Compared with Figure 2 (see III-1-3 above), it is fair to say that the role played by ROOs is much broader today. In particular, in options (2) to (4), the investigating authorities enjoy a wide range of discretions in applying case-specific ROOs to prevent circumvention of AD measures.

IV. Impact of HRO on the regulation of AD anti-circumvention measures

IV-1. Applicability of HRO to AD anti-circumvention measures

IV-1-1. ARO rules

The ARO defines an ROO as "laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods" (paragraph 1, Article 1 ARO). ROO "shall include all rules of origin used in non-preferential commercial policy instruments" (paragraph 2, Article 1 ARO), which thus include all trade remedy measures, i.e., AD measures, countervailing duties, and safeguard measures, as part of "non-preferential commercial policy instruments." The HRO is supposed to harmonize all the ROOs, except for those applied in preferential treatments, to ensure transparency and predictability (see Section I above).

It is not always necessary to determine the country of origin when identifying products subject to AD measures. It is also the discretion of the investigating authorities to specify "exporting country" to identify the scope of the measure, or to specify subject merchandise by combining the country of origin and exporting country. If subject merchandise is determined based on the exporting countries, it is not necessary to identify the country of origin or the ROOs. However, in some contexts, such as those involving Articles 2.2, 2.5, and 5.2 (iii) of the AD Agreement, the "country of origin" is used as a distinct element from "exporting country." In such cases, determination of the "country of origin" is required, in which case the HRO is to be applied accordingly. Furthermore, some WTO member states, including Japan, believe that the HRO should be applied to AD investigations in cases where the "concept" of origin is used in the process, whether or not there is an explicit reference to "country of origin."

IV-1-2. "Implications issue" as the biggest obstacle to HRO

As mentioned above, attempts to create a non-preferential HRO began in 1994, but little progress has been made since 2010. Originally, it is generally known that "substantial transformation" was the key to determining the country of origin for products produced across multiple countries was generally agreed upon. However, regarding the criteria for recognizing substantial transformation, it became agreeable which goods were to be applied with the value-added criteria, or the tariff classification change criteria. It applies even to the areas of machinery and textiles that are the most difficult areas due to strong political interests. However, it is safe to say that a bigger obstacle was the so-called "implications issue."

Here, the "implications issue" refers to the problem surrounding the repercussion of applying HRO to AD measures, particularly to the use of special ROOs for the purpose of capturing circumvention. First, there was a shared basic assumption that the ROOs required in the anti-circumvention inquiries are used to determine whether the products under review correspond to the country of origin specified in the existing AD measures. Therefore, HRO was considered to be applicable without doubt. According to this understanding, if the coun-

try of origin of a certain product is different from the country of origin of the subject merchandise, it is beyond the scope of the existing AD measures. Whether or not such products are configured as "circumvented" and what measures can be taken against circumvention is a matter mainly related to the WTO member states' rights and obligations under the AD Agreement, rather than the ARO. In this sense, the applicability of the HRO to anti-circumvention measures cannot be determined within the framework of the HRO or at the Committee of Rules of Origin. Thus, the "implications issue" is, in its substance, an issue that should be discussed and decided in the AD field, through deliberations at the AD Committee or at the AD Rules negotiation as part of the Doha Round negotiations. However, as mentioned above (see III-1-1), there is no agreement between WTO member states on whether anti-circumvention measures are allowed under the AD Agreement.

In contrast, some countries are concerned about the general and mandatory application of the HRO to the AD process because it may hinder the various measures available to the investigating authorities to deal with the fear of circumvention (see Section III above). According to them, the clearer the ROOs become, the easier it is to escape, as indicated by the *Bell Supply* and *Canadian Solar* judgments shown above. If anti-circumvention measures are allowed as a legitimate exception, even if there are no explicit provisions, under the AD Agreement, they contend that the ROOs applied in the original AD investigations and ROOs applied to prevent circumvention should be treated differently. Furthermore, since the scope of subject merchandise of AD measures are determined individually for each investigation, the ROOs that identify the country of origin of these specific merchandises should not necessarily be the same as generally applicable ROOs that are used by customs authorities. Careful scrutiny is necessary to find reasonable and practical ways to apply the HRO to diverse processes in the AD field. Therefore, apart from the provisions of Article 1 of the ARO, it is certainly necessary to perform a detailed examination of how a HRO could actually be applied to AD measures.

IV-2. Implications for intersystem coordination

Today, a growing number of WTO member states incorporate domestic mechanisms for certain types of AD anti-circumvention measures with the understanding that they are necessary to ensure the effectiveness of AD measures. Thus, pursuing an agreement among WTO member states that AD anti-circumvention measures cannot be taken unless explicitly stated in the AD Agreement, seems unlikely to succeed. In addition, no matter how we try to strengthen the international discipline on literal anti-circumvention measures, its effectiveness will erode rapidly if the use of case-specific ROOs is not regulated.

From a different perspective, however, it is observed that the current situation provides an opportunity to take a bold step to decouple the longstanding "implications issue" by separating AD anti-circumvention from the scope of the HRO. If it is considered unrealistic to apply the HRO in every situation where the country of origin is involved, allowing administrative discretion on whether or not to apply HRO to AD proceedings, regardless of the pro-

visions of Article 1, paragraph 2 of the ARO should be allowed. This can be done independently as an authoritative interpretation of ARO. It would eliminate the biggest obstacle to the adoption of Chair's proposal issued in 2010. Certainly, a decade has passed since that time, and it may be difficult to restart the harmonization now, due to the lack of political momentum and the dissipation of experts in this field. However, achievement of the non-preferential HRO project would be of great help for further comprehensive harmonization of ROOs in both non-preferential and preferential ROOs. At the same time, in the field of AD, it will remove one of the biggest obstacles to progress and clarify and improve the discipline under the AD Agreement. Imposing procedural burdens on anti-circumvention measures such as transparency and reasonableness while accepting the legitimacy of anti-circumvention measures will be seen as a significant contribution to this end, compared to the current situation in which willing countries apply anti-circumvention measures liberally, without common rules. This may have a positive impact on contemporary RTA negotiations. For example, the need to address circumvention is a focal issue in the US-Japan trade negotiations, strategic handling from a holistic perspective is desirable.

V. Conclusion

Under the AD Agreement, there is no consensus on how WTO member states can deal with circumvention. At the same time, ARO assumes that HRO will be applied to AD measures, although there are serious disagreements on how to apply HRO to anti-circumvention measures. The negotiations that tried to address complex issues across the two fields of WTO law, namely AD and ROO, have failed to make progress. On the other hand, a growing number of preferential ROOs coexist, and are becoming more frequently used than non-preferential ROOs. Furthermore, AD anti-circumvention measures are gradually being developed in the domestic AD systems of many WTO member states. Among others, the US has led the development of administrative actions approved by court judgments, which allows various measures to prevent circumvention, including the flexible use of ROOs, as shown in Figure 3 (III-3-3) above.

In seeking more effective international discipline on AD anti-circumvention, it is necessary to consider regulation with broader coverage, not only anti-circumvention inquiries as such, but also various forms of measures as well. Even Japan, one of the most rigorous WTO member states against anti-circumvention measures, used special ROOs in its AD investigation on dynamic random-access memories (DRAMs) from Korea in 2006 (Hasegawa 2018:31). Allowing certain flexibilities in the use of ROOs in the AD field may reduce long-lasting tensions surrounding the "implications issue" and help the HRO move forward.

To strike a right balance in international discipline, it is necessary to analyze how AD anti-circumvention measures can be designed reasonably and consistently in each country's domestic legal system and whether and how it is possible to build an effective anti-circumvention system with little fear of abuse. It will be a starting point for grasping the overall picture of the possible goal in future negotiations to clarify and improve the AD Agreement.

Therefore, as mentioned above (III-1-3), it is necessary to develop an inclusive and holistic approach comprising theoretical investigations as well as practical feasibility studies on the design of international disciplines to deal with these difficult inter-sectoral issues involving the ROOs and AD anti-circumvention.

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